No. 77-1569

In the Supreme Court of the United States

OCTOBER TERM, 1977

ANTHONY B. CATALDO and ADA W. CATALDO, PETITIONERS

v.

DAVID P. LAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners seek $100,000 in compensatory and punitive damages against respondents David P. Land and T. Gorman Reilly, who are Assistant United States Attorneys, and Robert Levine, a Revenue Agent of the Internal Revenue Service. Land and Reilly represented the government in an income tax refund suit brought by petitioners, and Levine was in charge of the audit underlying that suit. This suit is based upon petitioners' contention that respondents' conduct in connection with the refund suit was fraudulent. The district court found (Pet. App. B, pp. 50-60) that petitioners had failed to establish that respondents had acted fraudulently and held that they could not collaterally attack the judgment in that suit in favor of the government. The district court further held that the present action was barred by collateral estoppel. The court of appeals affirmed without opinion (Pet. App. A, pp. 48-49).

The pertinent facts, which are set forth in the district court's opinion (Pet. App. B, pp. 51-52), are as follows: An audit of petitioners' income tax returns for 1963 resulted in an assessment of $2,210.87, plus interest, for failure to substantiate various claimed deductions. Agent Levine supervised the audit. Petitioners paid the assessment under protest and instituted a refund action. After a trial, in which respondent Levine testified, and in which respondents Land and Reilly represented the government, the district court entered judgment for the government. The court of appeals affirmed *per curiam* (501 F. 2d 396), and this Court denied petitioners' motion for leave to file a petition for a writ of certiorari (Pet. App. C, p. 61).

Petitioners subsequently brought this action in the United States District Court for the Eastern District of New York claiming that respondents Land and Reilly committed fraud by arguing in the refund suit that petitioners bore the burden of proving their entitlement to various deductions even though the Internal Revenue Service had not contested those items administratively. In the refund suit, the district court sustained the government's position that petitioners had the burden of proof with respect to each item at issue (Pet. App. B, pp. 53-54).[1] Petitioners also alleged that prior to the refund suit Levine wrongfully refused to produce certain Internal Revenue Service documents relating to the audit. The district court ruled that the records did not have to be produced (Pet. App. B, p. 54).

The courts below correctly held that petitioners' action for damages against the revenue agent, and the government attorneys who defended against their tax refund suit was barred by collateral estoppel. Here, all three elements

[1]See, *e.g.*, *Helvering* v. *Taylor*, 293 U.S. 507, 514-515; *Lewis* v. *Reynolds*, 284 U.S. 281.

necessary for the application of collateral estoppel were met: (1) the same issues litigated in the refund suit were sought to be litigated in this suit; (2) the judgment in the refund suit was final and on the merits; and (3) the party against whom the defense of collateral estoppel is asserted is the same as or in privity with one of the parties in the prior adjudication (see *Blonder-Tongue Laboratories* v. *University of Illinois Foundation*, 402 U.S. 313, 323-324). Since the courts in the tax refund suit ruled against petitioners on each of the claims that they renew in this action for damages, they are collaterally estopped from further litigating these identical issues.

While the courts below had no occasion to reach the question (Pet. App. B, pp. 59-60 n. 2), respondents Land and Reilly, who participated in the refund suit as Assistant United States Attorneys, are at all events immune from suit as quasi-judicial officers. *Imbler* v. *Pachtman*, 424 U.S. 409; *Flood* v. *Harrington*, 532 F. 2d 1248 (C.A. 9). Respondent Levine is similarly immune whether the proper standard is one of absolute (*Barr* v. *Matteo*, 360 U.S. 564) or qualified (*Scheuer* v. *Rhodes*, 416 U.S. 232) immunity. Levine's testimony in court in connection with his audit was within the course of his official duties and he acted in good faith. Thus, even under a qualified immunity standard, requiring only a good faith belief that the conduct was proper and a reasonable basis for that belief, Levine was likewise immune from suit. *E.g.*, *Jones* v. *United States*, 536 F. 2d 269, 271-272 (C.A. 8); *Bryan* v. *Jones*, 530 F. 2d 1210 (C.A. 5) (*en banc*), certiorari denied, 429 U.S. 865; *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F. 2d 1339, 1347-1348 (C.A. 2).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1978.

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